85-1657

Supreme Court, U.S.
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SUPREME COURT NO. _____

SUPREME COURT OF THE UNITED STATES OF AMERICA

PAUL NELMS,

PETITIONER,

V.

T. J. WEAVER and wife, YVONNE WEAVER,

RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT
OF TENNESSEE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The central issue presented by the Petitioner's Petition to this Honorable Court is this:

Did the Tennessee Supreme Court err in affirming the judgment of the Tennessee Court of Appeals, by summarily dismissing the Petitioner's case for "mootness and other reasons", without subjecting the post-judgment actions of the trial court to review, where the rights of individuals not parties to this action are adversely affected?

In determining the merit of this issue, the Petitioner respectfully submits that the following issues must be considered and adjudicated:

ISSUE NO. 1: Did the Hardeman County Bank acquire an "assignment" from Nelms of the "contractual rights" accorded him by the sale of his Hardeman County Bank stock to Grantham, and therefore, an "assignment" of the annual payments due Nelms from Grantham under the provisions of the promissory note

given by Grantham by Nelms?

ISSUE NO. 2: If not, does Tennessee Code Annotated, Section 45-2-1104 (Acts of 1969, Chapter 36, §1) constitute a legislatively mandated exception to Tennessee Code Annotated, Section 47-9-304(1), (Acts of 1963, Chapter 81, §1 - U.C.C. Section 9-304)?

ISSUE NO. 3: Whether or not the Hardeman County Bank, under the terms of its security agreement with Nelms, acquired a valid, prior perfected security interest in the "Grantham" note, upon filing with the County Register and the Secretary of State, without taking actual possession of the note.

ISSUE NO. 4: Whether nor not the "Grantham" promissory note and its proceeds, are subject to execution and levy to satisfy the recorded judgment creditors, the Respondent Weaver.

ISSUE NO. 5: Whether or not Nelms was denied procedural due process by the application of Tennessee Code Annotated Section 24-8-101, et

seq., in the establishment of a copy of the "Grantham" note and related documents as a lost instrument or one in possession of an adverse party, and whether or not the interest of Nelms, his wife and daughter, who were co-maker and guarnator, on the notes to the Hardeman County Bank, were impaired thereby.

ISSUE NO. 6: Whether or not Nelms was properly adjudicated to be in contempt of court; if so, does this preclude him from appellate relief, and does it allow a court to adjudicate property rights of individuals who are not parties to these proceedings?

SUPREME COURT NO. _____

SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1985

PAUL NELMS,

PETITIONER

V.

T. J. WEAVER AND WIFE, YVONNE WEAVER,

DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT

OF TENNESSEE

PETITION FOR WRIT

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SUPREME COURT NO. _____

SUPREME COURT OF THE UNITED STATES OF AMERICA

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T. J. WEAVER and wife, YVONNE WEAVER,	)
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IN THE SUPREME COURT OF THE

UNITED STATES OF AMERICA

PAUL NELMS,	)	
	)	
PETITIONER,	)	
	)	
V.	:	NO. _____
	)	
T. J. WEAVER and	)	
wife, YVONNE WEAVER,	)	
	)	
RESPONDENTS.	)	

TO THE HONORABLE JUSTICES OF THE
SUPREME COURT OF THE UNITED
STATES OF AMERICA:

The Petitioner, Paul Nelms, respectfully petitions this Honorable Court for the issuance of a writ of certiorari so that the judgment of the Supreme Court of the State of Tennessee, dated December 30, 1985, may be reviewed and reversed.

For the purposes of this Petition, the parties will be referred to by name or by their respective postures in this Court; that is, Paul Nelms as the Petitioner and T. J. Weaver and wife, Yvonne

Weaver as the Respondents.

References to the Transcript filed in this cause as the record on appeal shall appear as T., with the appropriate volume number and numerical page designation following.

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UNOFFICIAL REPORTS OF THE OPNIONS DELIVERED IN

THE COURTS LISTED BELOW:

COURT OF APPEALS OF TENNESSEE

SUPREME COURT OF TENNESSEE

STATEMENT OF JURISDICTIONAL GROUNDS

Jurisdiction is conferred upon this Court by virtue of 28 U.S.C. §1257(3) because the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution of the United States, and further, that a right or privilege is claimed under the Constitution of the United States.

STATEMENT OF THE CASE

A. Procedure

The Respondents, T. J. Weaver and wife, Yvonne Weaver, were awarded a judgment in the amount of $346,664.00 against the Petitioner by the Circuit Court of Henry County, Tennessee, on November 8, 1983. The matters presented to this Honorable Court for review concern ancillary proceedings which were initiated in an attempt to collect this judgment.

On March 13, 1985, the Petitioner filed a Motion for Reconsideration and Finding of Fact in the trial court. (T. II - 166). The motion asked the trial court to determine the right of the Respondents to execute upon the Grantham note in satisfaction of their judgment, and raised questions of priority of security interests, perfection of same, assignment of contract rights and impairment of collateral rights of parties not involved in this litigation, the Petitioner's wife, Mrs. Betty Nelms, and his daughter, Nancy

Carol Wilson. (T. II - 166-187).

The motion was presented to the Trial Judge, Hon. Joe Riley, ex parte on March 12, 1985. The Court treated the motion as a request for a restraining order and set a hearing on same for March 14, 1985. (T. II - 175-176).

After hearing the proof on the merits, the Court, by order entered on March 28, 1985, overruled the motion, holding that the Respondent was in contempt of the orders of the Court and, therefore, was not entitled to seek affirmative relief as prayed for in his pleadings. The Court further held, as a matter of law, that the Hardeman County Bank did not have a valid perfected security interest in the Grantham note because it did not have possession of the note, and that the Respondents had priority because they were recorded judgment creditors. Therefore, the Grantham note could be sold to satisfy the judgment. (T. II - 226-227).

The Petitioner duly perfected his appeal to the Court of Appeals of the State of Tennessee. (T. II - 230-238). By order dated October 23,

1985, the Court of Appeals dismissed the Petitioner's case, upon motion of the Respondents for "mootness and other reasons."

On November 22, 1985, the Petitioner filed his Application for Permission to Appeal in the Supreme Court of the State of Tennessee. The application was denied on December 30, 1985.

No petition for rehearing was filed in either of the state appellate courts.

B. Evidence

On February 12, 1985, a hearing was held at the insistence of the Respondents and various banks which had certain security interests in various properties of the Petitioner. (T. III). Mr. Mike Rowland was called to testify that he was the present president of the Hardeman County Bank. (T. III - 28). The witness stated that the bank did not have possession of the Grantham note that the Petitioner had pledged to the bank as collateral for his indebtedness. (T. II - 29). Based upon this testimony and the representations of counsel

to the Court, the Court declared the Grantham note and certain Hardeman County Bank stock certificates pertaining thereto to be lost instruments, and setting up copies of same as the originals, making same subject to execution by the Respondents. (T. III - 33).

Upon obtaining present counsel, the Respondent, on his Motion for Reconsideration and Finding of Fact, obtained a hearing for the Court's review of the validity of its previous actions. (T. IV - 33). The Court's first inquiry had to do with whether or not the Petitioner was still in contempt of the Court for having failed or refused to file an expanded financial statement. (T. IV - 8). The Petitioner's counsel represented to the Court that the Petitioner was still technically still in contempt of Court, and that he was presently penally incarcerated in a correctional institution and was in the custody of the Tennessee Department of Corrections. (T. IV - 8-9).

The Petitioner so testified (T. IV - 29), and he admitted that he was still in contempt of Court at that time. He stated that he would comply with the Court's orders, but that he would require the assistance of a certified public accountant and an attorney for the preparation of such a financial statement, and that due to his present incarceration, it was impossible for him to comply with the Court's orders under the existing circumstances. (T. IV - 29-31).

The Petitioner stated that when he negotiated his loan with the Hardeman County Bank, he had always dealt with former bank president Larry Childers. (T. IV -32). He testified that the payments due him under the Grantham note were assigned to the Hardeman County Bank as security on his loan indebtedness to that institution and to service his loan. He identified various instruments shown to him which specifically recited the "assignment of the note payments", among other things. (T. IV - 33-35, and

Collective Exhibit One).

The Petitioner testified that the Grantham note came into existence when, prior to his loan transaction with the Hardeman County Bank, he sold some stock in the bank to Mr. Grantham. (T. IV - 36-39).

The evidence and testimony presented to the Court established that the Petitioner had assigned his rights to payment under the note to the Hardeman County Bank, and that subsequently the bank contacted Grantham (and Howell, Grantham's assignee), and notified them of the Petitioner's assignment, and instructed Grantham (and Howell) to make their annual payments on said note directly to the Hardeman County Bank. The payment was made directly to the bank, and the bank used such proceeds to service the Petitioner's loan as needed. (T. IV - 40-43, Collective Exhibit Four).

On cross-examination, the Petitioner stated that he was then in possession of the Grantham

note and always had been, despite misunderstandings to the contrary. (T. IV - 50).

Upon examination by the Court, the Petitioner stated that he had been in custody of the Department of Corrections continuously since June 4, 1984, and during that period, had met with his attorneys briefly on a few occasions. (T. IV - 55-56). He stated that he had not always known what was going on in his case, because of a lack of communication with his attorneys, and the restrictions imposed by his incarceration. (T. IV - 57). He stated that he had met with his accountant briefly to prepare tax returns. (T. IV - 58-59). The Petitioner further testified that he had been on work release since his incarceration and that he worked six (6) days a week under supervision. (T. IV - 59). He admitted being in contempt of the Court's order issued immediately prior to his incarceration. (T. IV - 61-62).

After the proof was concluded, the Court held that the Petitioner had been in contempt of Court for almost one (1) year, and that he had

had ample time and opportunity to purge himself of contempt. (T. IV - 84-85). The Court further held that the Grantham note was subject to execution because the Hardeman County Bank did not have possession of same at any time. (T. IV - 84-85).

The record will reflect that the bank has utilized proceeds from the Grantham note paid to it under its assignment from the Petitioner to service his loan.

CONTENTIONS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

A. The Petitioner testified at the February 12, 1985, hearing that he entered into a contract with P. T. Grantham, whereby he sold Grantham several shares of Hardeman County Bank stock in exchange for a total purchase price. Grantham gave the Petitioner a promissory note for the purchase price and the Petitioner endorsed ownership of the stock certificates over to Grantham, taking a security interest therein to secure payment of the purchase price.

The Petitioner further stated that when he negotiated his loan with the Hardeman County Bank, the loan payments due him under the Grantham transaction were "assigned" to the Hardeman County Bank as security on his loan indebtedness to that institution, primarily as collateral for his indebtedness, and specifically to pay accrued interest and otherwise "service" the loan. The

annual proceeds from the Grantham note were payable into an escrow account specifically for that purpose, to be administered in accordance therewith by two of the officers of the Hardeman County Bank, including the then-president and chief executive officer, Mr. Larry Childers.

At the February 12, 1985 hearing, the Petitioner identified various instruments which specifically recited the "assignment of the note payments", among other things. (T. IV - 33-35, Collective Exhibit One).

The Petitioner further testified that subsequently Grantham transferred the rights under the stock sale agreement to Roland Howell, thereby making both Grantham and Howell obligors relative to the indebtedness owed the Petitioner. (T. IV - 36-39).

Tennessee Court opinions indicate that an effective assignment is created when there is a writing (which has been satisfied by the "assignment of note payments"), and an adequate description. From the terms of the subject

assignment of note payments, it is obvious that the right assigned is adequately described. Such assignment clearly manifested an intent to transfer the Petitioner's rights under the Grantham note completely and immediately to the Hardeman County Bank, by the use of generally accepted words of transfer. Although consideration is generally not required, consideration was included in this assignment. Therefore, it would appear that the Hardeman County Bank did acquire an assignment from the Petitioner of the contractual rights accorded to him by virtue of the Grantham transaction.

The security agreement between the Petitioner and his wife (and his daughter as guarantor), and the Hardeman County Bank officials (including the president, Larry Childers), as "co-trustees" for the collection and administration of the Grantham note proceeds. The record will reflect that this "escrow account" was not only the vehicle of payment of the accrued interest of the Hardeman County Bank indebtedness,

but also the mode of payment of other loans owed by the Petitioner, as it was originally intended to do, even after the establishment by the trial court of the "lost or destroyed instruments." In fact, bank officials have continued to pay themselves and others out of the "escrow account", even after the trial court permitted garnishment on the Grantham note by the Respondents.

The Petitioner respectfully submits that the Tennessee courts have ignored his contractual rights with the Hardeman County Bank and allowed the Respondents to garnish proceeds of the Grantham note which were, by contract, assigned to the bank to service the Petitioner's indebtedness there. The Petitioner further contends that the actions of the state courts in this regard rises to constitutional proportions, amounts to a nullification of his contractual rights and a taking of his property without due process of law.

B. It is the position of the Petitioner that Tennessee Code Annotated, Section 45-2-1104

(Acts of 1969, Chapter 36, Section 1), which prohibits state banks from making any loans on the security of the shares of its own capital stock, and from being the holder thereof, constitutes a legislatively mandated exception to Tennessee Code Annotated, Section 47-9-304(1) (Acts of 1963, Chapter 81, Section 1 - UCC9-304), which provides that a security interest in "negotiable instruments may be perfected by filing...and, in instruments other than chattel paper can be perfected only by taking possession ..." (emphasis supplied).

Under the terms of the first sentence of Tennessee Code Annotated, Section 47-9-304(1), a security interest in chattel paper or negotiable instruments may be perfected by filing. A security interest in instruments other than instruments which constitute part of chattel paper can be perfected only by the secured party taking possession. Unlike other states, Tennessee did not adopt that provision of the Statute of Frauds in the Uniform Commercial Code

Statute adopted by those states which required filing of chattel paper and negotiable instruments in order to perfect a security interest in same, but provided as well for the perfection of the security interest by mere possession only. The Uniform Commercial Code was codified in Tennessee in 1963. In 1969, the Tennessee legislature codified Tennessee Code Annotated, Section 45-2-1104, which apparently is an exception to the Uniform Commercial Code provisions. Reduced to its simplest terms, the statute says that no state bank shall be the holder of any shares of its own capital stock for security.

It is the Petitioner's contention that the Hardeman County Bank did not take possession of its own capital stock which secured the Grantham note and which was the subject of the assignment from the Petitioner to the bank because it could not and did not wish to violate Tennessee Code Annotated 45-2-1104. To do otherwise would have constituted a violation of the law.

On the facts of this case, it would appear that by a fair interpretation of these two statutes, a legal exception is constituted to that provision of Tennessee law requiring that a security interest in a promissory note can only be perfected by actual possession. To permit also that the perfection of a security interest in such a note may be effected by filing is not only consistent with the first sentence of the statute, but also permits a state bank the latitude of perfecting its security interest by filing, which comports to the provisions of that portion of the Statute of Frauds in the Uniform Commercial Code adopted in other states.

The Petitioner respectfully submits that it was the intent of the legislature not to restrict the perfection to only possession but to permit such possession as a wider latitude and an additional method of perfecting such security interests in promissory notes. This conflict in state statutes, and the Petitioner's loss of property by virtue of the state courts'

interpretation thereof, is a constitutional question, and justifies review by the Supreme Court.

C. By virtue of the conflict in the statutes as hereinbefore alluded to, the Petitioner asserts that the Hardeman County Bank, under the terms of its security agreement, acquired a valid prior perfected security interest in the Grantham note upon filing with the Counter Register's Office of Hardeman County, Tennessee, and in the office of the Secretary of State of the State of Tennessee, without actually holding or being in possession of same. Irregardless of the construction of the statutes, the Petitioner asserts that the filing of the security agreement and supporting documents constituted actual notice to the Respondents, who were judgment creditors. Filing in the proper offices constitutes and establishes first in time notice to the entire world, particularly to judgment creditors.

The Petitioner questions the provisions of

Tennessee law which require possession of certain instruments for perfection of a security interest therein, especially as it applies to him. Does filing in a case such as this provide notice, and does the requirement of possession violate the Petitioner's rights, when notice which comports with constitutional requirements is given by proper filing? The Petitioner respectfully submits that this question virtually cries out for review by the Supreme Court.

D. The Petitioner alleges that the state court ruling that the Grantham note and its proceeds were subject to levy and execution to satisfy the Respondents, who were judgment creditors, was improper, when considering the foregoing analysis. Because the trial court's action in allowing such levy and execution affected substantial property interest of the Petitioner and his wife and daughter, the Supreme Court would be justified in reviewing the matter.

E. The Petitioner would further state that the state courts have denied him procedural due process of law by the manner in which the trial court established the Grantham note and the Hardeman County Bank stock certificates as lost instruments or instruments in the possession of an adverse party, pursuant to Tennessee Code Annotated, Section 24-8-101, et seq. The record shows that a hearing was initiated and had at the insistance of the Respondents and various banks which had security interests in certain properties owned by the Petitioner. At the hearing, Mike Rowland testified that he was the current president of the Hardeman County Bank, and that the bank did not have possession of the Grantham note that the Petitioner had ostensibly pledged to the bank as collateral on his indebtedness. (T. IV - 20-29). Neither the Petitioner nor his then-counsel were present at this hearing.

Based upon this testimony, and the representations of counsel to the court, the court proceeded to declare the Grantham note and the

stock certificates pertaining thereto to be "lost records or documents," thereby judicially establishing a copy of the note and stock certificates to be original instruments, and declaring that the note was subject to levy and execution by the Respondents. (T. III - 33). It is the contention of the Petitioner that the procedure followed in the Henry County Circuit Court was not in compliance with Tennessee Code Annotated, Section 24-8-101, et seq., with regard to the prescribed procedure for establishment of a lost instrument.

The statute provides that any lost instrument may be supplied by affidavit of any person acquainted with the facts, stating the contents thereof, as near as may be, and that such instrument has been unintentionally lost or mislaid, and is still the property of the person claiming under it, unpaid and unsatisfied.

The record in this matter will reflect that the president of the Hardeman County Bank, Mike Rowland, testified that he looked at the Paul Nelms loan file with regard to an indebtedness

which was made in October, 1983, in the amount of "some five hundred one thousand odd dollars." Mr. Rowland was asked by counsel for the Respondents if he had the original "installment collateral note" in his loan file, and Mr. Rowland answered, "We do not sir." Mr. Rowland further indicated that he did not have the security agreement which would accompany the Grantham note or the stock certificates which were the collateral for said note. The following exchange took place:

> "Q. Just for the purposes of the record, Mr. Rowland, at the point in these proceedings in which we received the response of Mr. Nelms to Mr. Greer's motion on behalf of Mr. Weaver, I believe that I contacted you and asked you to conduct an additional search of the records of the bank and also the vault or safe keeping place where you hold the collateral. Am I correct in that?
>
> A. Yes sir, you told me and I did that myself.
>
> Q. And in the course of that, did you find any of the documents referred to by Mr. Greer?
>
> A. None of these three documents were there, no, sir.
>
> Mr. Redding: That's all."

It is the Petitioner's position that the testimony of Mr. Rowland was not such as to establish that the instrument has been unintentionally lost or mislaid, or that it was still the property of the person claiming under it, unpaid and unsatisfied, as required by the statute.

The Petitioner asserts that the "affidavit" of Mr. Rowland is defective in that it omitted a statement that the instrument was still the property of the claimant, and was unintentionally lost. Buckner v. Geodeker, 45 S.W. 448 (Tenn. Court App., 1897). The secondary evidence as to the contents of a lost instrument cannot be heard until its nonproduction is accounted for by the person last having the legal custody thereof. Pharris v. Lambert, 33 Tenn. 228 (1853). Oral proof as to the contents of a lost deed or other paper relied on as evidence cannot be heard until ground has been laid by proof that all the proper sources for the recovery of the original have been searched in vain. Vaulx v. Merriwether, 34 Tenn. 683(1855). The Petitioner also advances

the case of Cheek v. Jones, 49 Tenn. 170(1870), wherein the Court held that the loss of a bond is not sufficiently established by the testimony of the clerk of the county court, who came into office some sixteen or seventeen years after its execution, where said clark testified that since the case was called for trial, he had examined the papers in his office labelled "1851", which was the year the bond was given, and did not find the bond, so as to authorize secondary evidence of the bond.

Tennessee Code Annotated, Section 24-8-102 provides in part that if an instrument is wrongfully in possession of a party who fails to produce it upon notice, its place may be supplied by an affidavit of any person acquainted with the facts, stating the contents as near as may be, the wrongful possession of the opposite party, notice to produce, and that such instrument is the property of the person claiming under it, unpaid and unsatisfied. At the hearing, counsel for the Respondents indicated that the person

entitled to possession of the Grantham note at this point was the Sheriff of Henry County, Tennessee, to whom he had directed the execution. According to Tennessee law, oral evidence is not admissable to show the contents of an instrument in possession of an adverse party, unless notice has been given him to produce it. Campbell v. Joslin, 1 Tenn. 380(1809). Under the procedure establishing the lost instrument followed by the trial court in this case, oral evidence was accepted prior to notice to the Petitioner to produce said note. Indeed, the Petitioner stated on February 12, 1985, that he was then in possession of the Grantham note and that since its inception had always been continuously in possession of said instrument, contrary to misrepresentations otherwise. (T. IV - 50).

The same arguments which the Petitioner has made with regard to the establishment of the Grantham note can also be made with regard to the stock certificates of the Hardeman County Bank which secured said note.

The Petitioner respectfully submits that his interests, as well as those of his wife and daughter, co-maker and guarantor, respectively, on the Hardeman County Bank obligation, and other obligations, were compromised, impaired or obliterated by the action of the court relative to its holding establishing the Grantham note and stock certificates as lost instruments. In its ruling the trial court held that the Grantham note, as established by the court, was subject to execution by the Respondents, and by so holding, the court, in effect, removed it as collateral from the Hardeman County Bank where it had been pledged as security for the indebtedness owed by the Petitioner and his wife, and guaranteed by his daughter. By holding that the Grantham note (which was valued at some $430,000.00) did not secure the indebtedness owed to the Hardeman County Bank, the court in effect, under-collateralized the loan with the bank, thereby adversely affecting the interests of the Petitioner, as well as those of his wife and daughter, who were not parties to this action.

Therefore, the Petitioner believes that the state courts have denied him procedural due process of law in the manner in which the Grantham note and stock certificates were established as lost instruments. After this, the Petitioner contends that his rights, as well as the rights of his wife and daughter, were further compromised when said note, after established, was declared subject to execution. This deprivation of property rights is not constitutional, and should be reviewed by the Supreme Court.

F. The trial court's finding that the Petitioner was in contempt is, under the facts and circumstances of this case, an abuse of the court's discretion. The Petitioner contends that he was not in wilfull contempt of the court, and the holding of the court that he has been in contempt of the court for almost one full year constitutes an abuse of the court's discretion.

The record will reveal that in the hearing on February 12, 1985, the Petitioner's counsel

represented to the court that the Petitioner was "technically" still in contempt of court, due to the fact that he was presently incarcerated in a correctional institution and in the custody of the Tennessee Department of Corrections. (T. IV - 8-9). The Petitioner testified that he would comply with the court's orders, but indicated he would require the assistance of a certified public accountant as well as an attorney for the preparation of an expanded financial statement. The Petitioner further testified that due to his incarceration, it was impossible for him to comply with the court's orders under the existing circumstances. (T. IV - 29-31).

Upon examination by the court, the Petitioner stated that he had been in the custody of the Department of Corrections continually since June 4, 1984, and that in the interim he had met with his attorneys briefly on a few occasions since his incarceration. (T. IV - 55-56). The Petitioner stated that he had not

always known what was going on in his case, partly because of a lack of communication with his attorneys as well as restrictions imposed by his incarceration. (T. IV - 57). The Petitioner indicated that he had met briefly with his accountant to prepare tax returns. (T. IV - 58-59). The Petitioner further testified that he had been on work release since his incarceration and that he had worked six (6) days a week under supervision. (T. IV - 59). Upon this testimony the court held that the Petitioner had been in contempt of court for almost one year, and that he had ample time and opportunity to purge himself of contempt. (T. IV - 84-85).

The Petitioner would rely upon the case of Gossett v. Gossett, 241 SW2d 934(1951), wherein it was held that when one has been found guilty of contempt, it is only when he has the present ability to perform that he can be committed until he does perform. If he is unable to perform in part, he may be committed until he performs to

that extent. If he is totally unable to perform, he can be punished only by fine not exceeding $50.00, or imprisonment for not more than 10 days, or both. Therefore, based on the Petitioner's inability to comply with the court's orders due to his incarceration, he contends that the court erred in finding him in contempt of court.

The implications of the court's adjudication of contempt was indeed far-reaching because the court further held that the Petitioner, because of his contempt was precluded from seeking affirmative relief. As a result all claims that the Petitioner had advanced in the state courts pertaining to his case have fallen on deaf ears.

It is the contention of the Petitioner that the finding of the Henry County Circuit Court that Petitioner was in contempt of court, should not preclude the courts from determining, declaring and adjudicating the property rights of the Petitioner and of all parties of interest in these proceedings with regard to the issues set forth herein. The finding of the courts that

the Petitioner is in contempt should not be allowed to cut off appellate avenues with regard to the litigation of the property rights of the Petitioner who was not present at that hearing and who was also not represented by counsel at that hearing. Furthermore, for the Henry County Circuit Court to litigate with regard to the rights of individuals who were not made party to that action results in a violation of the Due Process Clauses of the Constitutions of the State of Tennessee and the United States of America, and would impose a grossly unfair burden upon said parties.

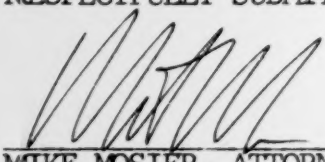
It is, finally, the position of the Petitioner that a denial of appellate review by virtue of the contempt adjudication, could be construed to constitute a violation of Tennessee Code Annotated, Section 29-9-103, wherein the punishment for contempt is set at a maximum $50.00 fine and imprisonment not exceeding ten (10) days. Therefore, it is the contention of the Petitioner that the trial court abused its

discretion in finding that the Petitioner was in contempt of court, and as a result, that he was precluded from seeking affirmative relief. The Petitioner respectfully submits that the holding of the state courts in this regard operates to deny him the right to litigate substantial questions involving his property rights and the property rights of others, thereby denying him the constitutional protections against the taking of his property without being afforded due process of law.

CONCLUSION

In light of the contentions advanced by the Petitioner, he respectfully prays that this Honorable Court award a writ of certiorari, to the end that his case may be reviewed and reversed, so as to correct the error in the lower courts and to allow him the benefits of the constitutional guarantees to which he is entitled.

RESPECTFULLY SUBMITTED,



MIKE MOSIER, ATTORNEY
FOR PETITIONER
120 N. Washington Ave.
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APPENDIX

STATUTES

T.C.A. Sec. 45-2-1104. Loans on own stock prohibited -- Exceptions. -- No state bank shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase be necessary to prevent loss upon a debt previously contracted in good faith, and stock so purchased or acquired shall, within six (6) months from the time of its purchase, be sold or disposed of at public or private sale. (Acts 1969, ch. 36, Sec. 1 - 3.241; T.C.A. Sec. 45-431.)

T.C.A. Sec. 47-9-304. Perfection of security interest in instruments, documents and goods covered by documsnts -- Perfection by permissive filing -- Temporary perfection without filing or transfer of possession. --(1) A security interest in chattel paper or negotiable documents may be perfected by filing. A security interest in instruments (other than instruments which constitute part of chattel paper) can be perfected

only by the secured party's taking possession, except as provided in subsections (4) and (5).

(4) A security interest in instruments or negotiable documents is perfected without filing or the taking of possession for a period of twenty-one (21) days from the time it attaches to the extent that it arises for new value given under a written security agreement.

(5) A security interest remains perfected for a period of twenty-one (21) days without filing where a secured party having a perfected security interest in an instrument, a negotiable document or goods in possession of a bailee other than one who has issued a negotiable document therefor:

(a) makes available to the debtor the goods or documents representing the goods for the purpose of ultimate sale or exchange or for the purpose of loading, unloading, shoring, shipping, trans-shipping, manufacturing, processing, or otherwise dealing with them in a manner preliminary to their sale or exchange; or

(b) delivers the instrument to the debtor for the purpose of ultimate sale or exchange or of presentation, collection, renewal or registration or transfer.

T.C.A. Sec. 24-8-101. Affidavit of loss.-- Any lost instrument may be supplied by affidavit of any person acquainted with the facts, stating the contents thereof, as near as may be, and that such instrument has been unintentionally lost or mislaid, and is still the property of the person claiming under it, unpaid and unsatisfied. (Code 1858, Sec. 3901, deriv. Acts 1819, ch. 27 §1); Shan. § 5694; Code 1932, § 9879; T.C.A. (orig. ed.), § 24-801.)

T.C.A. Sec. 29-9-103. Punishment. -- (a) The punishment for contempt may be by fine or by imprisonment or both.

(b) Where not otherwise specially provided, the circuit, chancery, and appellate courts are limited to a fine of fifty dollars ($50.00), and imprisonment not exceeding ten (10) days, and all other courts are limited to a fine of ten dollars

($10.00). (Code 1858 § 4107; Shan., § 5919; Code 1932, § 10120; T.C.A., orig. ed., § 23-903).

T.C.A. Sec. 24-8-102. Instrument in possession of adverse party. -- So, also, if such instrument is wrongfully in the possession of the opposite party, who fails to produce it upon notice, its place may be supplied by the affidavit of any person acquainted with the facts, stating the contents as near as may be, the wrongful possession of the opposite party, notice to produce, and that such instrument is the property of the person claiming under it, unpaid and unsatisfied. (Code 1858 § 3902, deriv. Acts 1819, ch. 27 §1; Shan., §5695; Code 1932, § 9880; T.C.A. orig. ed., § 24-802).

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

T. J. WEAVER et ux.,	)	
	)	
Plaintiffs/Appellees,	)	
	)	
v.	:	Henry Law No. 1
	)	
PAUL NELMS,	)	
	)	
Defendant/Appellant.	)	

ORDER

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be and the same hereby is denied at the cost of appellant.

PER CURIAM

(Filed December 30, 1985
Jewell Reddin, Clerk)

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

PAUL NELMS,	)	
	)	
Appellant	)	
	)	
v.	:	Henry Law No. 1
	)	
T. J. WEAVER and wife, YVONNE WEAVER,	)	
	)	
	)	
Appellees	)	

ORDER

Appellee's motion to consider post judgment facts is hereby granted and appellee's motion to dismiss the appeal for mootness and other reasons is also hereby granted with costs adjudged against appellant and surety.

Enter October 23, 1985.

/s/ NEARN
NEARN, P. J., W. S.

/s/ TOMLIN
TOMLIN, J.

(Filed October 23, 1985
Jewell Reddin, Clerk)